Supreme Court, U.S.
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No. 96-752

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM ARAMONY AND THOMAS J. MERLO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on co-conspirator liability under the *Pinkerton* doctrine.

2. Whether it was reversible error for the district court to withhold from the jury the materiality element on the tax fraud counts.

3. Whether the district court acted within its discretion in denying petitioners' claim for an evidentiary hearing on certain privilege issues.

4. Whether the district court properly declined to give a "theory of defense" instruction for petitioner Merlo.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 88 F.3d 1369.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1996. A petition for rehearing was denied on August 13, 1996. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on November 12, 1996 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; interstate transportation of fraudulently acquired property, in violation of 18 U.S.C. 2314; engaging in monetary transactions in the proceeds of unlawful activity, in violation of 18 U.S.C. 1957; and filing false tax returns, in violation of 26 U.S.C. 7206(1) and (2). Petitioner Aramony was sentenced to 84 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner Merlo was sentenced to 55 months' imprisonment, to be followed by a three-year term of supervised release. In addition, petitioners were ordered to forfeit $552,188.97. The court of appeals reversed petitioners' convictions under Section 1957, on which the forfeiture order was based, but affirmed their convictions on all other counts. The court vacated the forfeiture order and remanded for resentencing. Pet. App. 1a-46a.

1. Petitioners' convictions arose from their participation in a scheme to defraud the United Way of America (UWA), a non-profit organization that acts as a service organization for local United Way chapters throughout the United States. Petitioner Aramony was chief executive officer of UWA from 1970 until 1992, when he was fired. Petitioner Merlo, a certified public accountant and a close friend of Aramony, performed accounting services for UWA in the 1970s and became UWA's chief financial officer in late 1989. Co-defendant Stephen Paulachak worked

for UWA from the 1970s until 1988, when he left to become the president of Partnership Umbrella, Inc. (PUI). PUI was a for-profit organization established by the UWA Board of Directors in 1986 to ensure, among other things, UWA's continued status as a non-profit organization. Pet. App. 3a-4a.

From the mid-1980s until the early 1990s, petitioners used UWA's money for their own personal gain; Aramony, in particular, used that money to underwrite his relationships with various women. During the late 1980s, for example, Aramony regularly flew to Florida at UWA expense to visit Lori Villasor, and he used UWA and PUI funds to pay Villasor's way on trips she took with him. Aramony used Merlo to funnel additional money to Villasor. For instance, from 1988 to 1991, Merlo received more than $300,000 in consulting fees from PUI despite doing no work for the money; he then, in turn, gave Villasor $89,000 that she did not earn. Pet. App. 4a-6a. Similarly, with Merlo's help, Aramony diverted corporate donations from UWA to a Florida corporation that he controlled, and then used that money to buy himself a Florida condominium, which was furnished with UWA funds. *Id.* at 6a-7a. For his part, Merlo used his position as UWA's chief financial officer to enrich himself by, for example, improperly converting a $375,000 UWA annuity to his personal property. *Id.* at 7a-8a.

Aramony aided in the filing of false tax returns on behalf of UWA for tax years 1989 and 1990. He also filed false personal income tax returns for tax years 1988 through 1990, claiming false deductions and understating his income. Merlo aided in the filing of false tax returns for PUI in tax years 1989 and 1990, aided in the filing of two false tax documents for work

that Villasor never did, and filed three other false tax returns. Pet. App. 8a.

2. In late 1991, Aramony learned that the *Washington Post* was investigating alleged improprieties in the management of UWA. Soon thereafter, UWA, through General Counsel Lisle Carter, hired Investigative Group, Inc. (IGI) to conduct an internal investigation. In January 1992, IGI delivered its preliminary findings to the UWA Board of Governors. In early February 1992, UWA retained the Washington law firm of Verner, Liipfert, Bernhard, McPherson & Hand to join the investigation and give legal advice concerning UWA's response to any negative publicity that might arise from the *Washington Post* investigation. Pet. App. 35a-36a.

During UWA's internal investigation, Aramony made communications to Carter and IGI investigators that were later used against him in his criminal prosecution. Pursuant to subpoena, the Verner, Liipfert attorneys produced various documents to the government that tended to incriminate Aramony. Long after those documents were produced (with Aramony's knowledge and acquiescence, see Pet. App. 44a), Aramony claimed that Carter, IGI, and the Verner, Liipfert attorneys had all breached duties of confidentiality to him. He moved to suppress the documents and his communications to Carter and IGI on grounds of attorney-client privilege. He also moved for an evidentiary hearing on his privilege claims. See *id.* at 38a-39a & n.12.

The district court denied Aramony's suppression motion. The court based that ruling on overwhelming evidence that the attorneys in question represented UWA and not Aramony, and that Aramony therefore had no attorney-client relationship that could support

his claims of privilege. See Pet. App. 35a-45a. Moreover, the district court found "from the submissions and the affidavits presented that there isn't a sufficient issue presented that would necessitate any kind of evidentiary hearing. The affidavits presented by all of the lawyers in the case have stated that there was no attorney/client relationship." C.A. App. 335; Pet. App. 38a.

Aramony then sought a writ of mandamus requiring the district court to conduct an evidentiary hearing on the privilege issue. The court of appeals dismissed that request "without prejudice to [Aramony's] right to raise the attorney-client privilege during the course of the trial." Pet. App. 38a; C.A. App. 525. At trial, Aramony cross-examined Carter and an IGI investigator on the privilege issue, but he did not seek the testimony of the Verner, Liipfert attorneys. Pet. App. 43a n.13.

3. At the close of trial, the district court instructed the jury that petitioners could be held accountable for the substantive offenses of any coconspirator so long as, among other things, "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." See Pet. App. 17a-19a (quoting full instruction); see generally *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Aramony objected to that instruction on the ground that it did not explicitly predicate *Pinkerton* liability on a finding that the substantive offenses in question were "reasonably foreseeable as a necessary or natural consequence of the conspiratorial agreement." Pet. App. 17a.

In instructing the jury on the elements of filing a false tax return under 26 U.S.C. 7206, the district court—over defense objection, but in accordance with

the controlling precedent at the time of trial—did not submit to the jury the issue of the materiality of the false statements in the tax returns. Pet. App. 23a-24a. Instead, the court told the jury: "Concerning the [materiality] element, I would instruct you that a false deduction on a tax return is a material item. Similarly, income [omitted] from a tax return is a material matter." *Id.* at 24a; C.A. App. 1587-1588. After trial, this Court decided *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), holding that the Constitution entitles a defendant to jury consideration of the materiality element in a false-statements prosecution under 18 U.S.C. 1001. Petitioners moved for a new trial on their Section 7206 convictions on the ground that the materiality issue should have been submitted to the jury. The district court denied those motions. Pet. App. 24a-25a.

4. The court of appeals reversed petitioners' convictions under 18 U.S.C. 1957, which prohibits monetary transactions in the proceeds of unlawful activity, but affirmed their convictions on all other counts. Pet. App. 1a-46a. (Because the forfeiture order was predicated on the reversed convictions, the court vacated that order and remanded for resentencing. *Id.* at 35a n.11, 46a.)

The court first rejected petitioners' contention that the district court's instruction inadequately conveyed the requirements of the *Pinkerton* doctrine. Following circuit precedent, see *United States* v. *Chorman*, 910 F.2d 102 (4th Cir. 1990), the court held that, even though the instruction did not use the "reasonably foreseeable" language requested by petitioners, it accurately represented *Pinkerton*'s theory of liability. Pet. App. 19a-22a.

The court also rejected petitioners' challenge to the district court's instructions concerning the elements of filing a false tax return. The court found that, even if *Gaudin* required jury consideration of the materiality issue (an issue the court did not reach), the district court's failure to submit that issue to the jury was harmless beyond a reasonable doubt because the jury's other findings were functionally equivalent to a finding of materiality. Pet. App. 26a-30a. Specifically, the district court had instructed the jury that, to convict, it needed to find "that the income was understated or that the deductions were overstated by some substantial amount." C.A. App. 1588; Pet. App. 26a. The court of appeals explained that, because the materiality inquiry asks "whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly,'" Pet. App. 28a (quoting *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969)), a "finding of substantiality necessarily included a finding of materiality," and any error the district court made in failing to instruct on the latter issue was therefore harmless. *Id.* at 30a.

The court also rejected petitioners' claim that the district court improperly admitted privileged communications. Pet. App. 35a-45a. The court upheld the district court's findings that Aramony had no confidential relationship with Carter, the IGI investigators, or the Verner, Liipfert lawyers. *Id.* at 41a, 44a. The court further held that, "[b]ecause the affidavits submitted by the government and the testimony of the government's witnesses, when taken at face value, reveal there was no chance Aramony would prevail on his claim, the district court did not err when it refused to hold an evidentiary hearing." *Id.* at 40a n.12; see also *id.* at 44a-45a.

As to petitioners' other claims, the court found "no error committed by the district court affecting [their] substantial rights." Pet. App. 46a.

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the district court's *Pinkerton* instruction requires reversal because it did not explicitly state that a defendant is liable under the *Pinkerton* doctrine for the substantive acts of his co-conspirators only if those acts were "reasonably foreseeable." That claim is without merit.

In *Pinkerton* v. *United States*, 328 U.S. 640 (1946), defendant Daniel Pinkerton and his brother were charged with conspiracy to violate the tax laws and with two substantive tax violations. Although no evidence was introduced showing that Daniel Pinkerton participated directly in the commission of the substantive offenses, the district court instructed the jury that each defendant could be found guilty of the other's substantive offenses if they were both part of the same criminal conspiracy and "the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy." *Id.* at 645 n.6; see also *id.* at 645. This Court upheld Daniel Pinkerton's conviction under a theory of co-conspirator liability, but cautioned that the case would be different "if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-648.

As petitioners correctly note (see Pet. 8-9), the courts of appeals commonly cite that passage of *Pinkerton* in describing the scope of co-conspirator liability.[1] Some circuits, like the Fourth Circuit in this case, have found that an instruction may adequately convey *Pinkerton*'s theory of co-conspirator liability without specifically referring to a "reasonable foreseeability" requirement. See *United States* v. *Chorman*, 910 F.2d 102, 111 (4th Cir. 1990); *United States* v. *Manzella*, 791 F.2d 1263, 1267-1268 (7th Cir. 1986); *United States* v. *Vasquez*, 858 F.2d 1387, 1393 & n.3 (9th Cir. 1988), cert. denied, 488 U.S. 1034 & 489 U.S. 1029 (1989); cf. *United States* v. *Pinkney*, 15 F.3d 825, 828 (9th Cir. 1994) (indicating that sentence enhancement under *Pinkerton* is proper only where co-conspirator's substantive acts are reasonably foreseeable). In contrast, other circuits have indicated that a *Pinkerton* instruction must explicitly include "reasonable foreseeability" language even though that language did not, in fact, appear in the jury

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[1] See, *e.g.*, *United States* v. *Mothersill*, 87 F.3d 1214, 1218 (11th Cir.), cert. denied, 117 S. Ct. 531 (1996), petition for cert. pending, No. 96-6899 (filed Nov. 22, 1996); *United States* v. *Pimentel*, 83 F.3d 55, 58 (2d Cir. 1996); *United States* v. *Friend*, 50 F.3d 548, 552-553 (8th Cir. 1995), cert. denied, 116 S. Ct. 814, reh'g granted, order denying certiorari vacated, and judgment vacated on other grounds, 116 S. Ct. 1538 (1996); *United States* v. *Christian*, 942 F.2d 363, 367 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); *United States* v. *Cummings*, 937 F.2d 941, 944 (4th Cir.), cert. denied, 502 U.S. 948 (1991); *United States* v. *Garcia*, 909 F.2d 1346, 1350 n.1 (9th Cir. 1990); *United States* v. *Romero*, 897 F.2d 47, 51 (2d Cir.), cert. denied, 497 U.S. 1010 (1990), 498 U.S. 1092 (1991); *United States* v. *Diaz*, 864 F.2d 544, 549 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989); *United States* v. *Meester*, 762 F.2d 867, 877 (11th Cir.), cert. denied, 474 U.S. 1024 (1985).

instructions in *Pinkerton* itself. See *United States* v. *Turcks*, 41 F.3d 893, 897 (3d Cir. 1994), cert. denied, 115 S. Ct. 1716 (1995); *United States* v. *Broadwell*, 870 F.2d 594, 603 (11th Cir.), cert. denied, 493 U.S. 840 (1989); cf. *United States* v. *Friend*, 50 F.3d 548, 553 n.3 (8th Cir. 1995) (approving instructions that include the "reasonable foreseeability" language, but not directly addressing issue), cert. denied, 116 S. Ct. 814, reh'g granted, order denying certiorari vacated, and judgment vacated on other grounds, 116 S. Ct. 1538 (1996); *United States* v. *Lucas*, 932 F.2d 1210, 1220 (8th Cir.) (same), cert. denied, 502 U.S. 869, 929, 949, 991 (1991), 502 U.S. 1100 (1992). We are aware of no case, however, and petitioners cite none, in which a court of appeals has reversed a conviction because the *Pinkerton* instruction omitted such language.

The better practice is to include "reasonable foreseeability" language in any *Pinkerton* instruction. Nonetheless, because the district court's instruction adequately conveyed *Pinkerton*'s theory of co-conspiratorial liability, it did not constitute reversible error. Although it omitted the "reasonable foreseeability" language, it did instruct the jury that a finding of co-conspirator liability is appropriate only if "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." Pet. App. 18a. In that respect, the instruction here was substantively indistinguishable from the one given in *Pinkerton*. See 328 U.S. at 645 n.6.

In any event, any error in the district court's *Pinkerton* instruction was harmless. In light of the evidence introduced at trial, see Gov't C.A. Br. 5-41, it appears likely that petitioners' convictions on the substantive counts rested not on a *Pinkerton* theory,

but on their direct involvement in the substantive offenses at issue, either as principals or as aiders and abettors. See *id.* at 58. Thus, because the *Pinkerton* instruction was superfluous, any error in that instruction was harmless. See, *e.g.*, *Broadwell*, 870 F.2d at 609 ("[W]e find no prejudicial error in the district court's failure to provide the 'reasonably foreseeable' portion of the instruction."); *United States* v. *Meester*, 762 F.2d 867, 878 n.9 (11th Cir.) (no prejudicial error in failing to include "foreseeability" language in the *Pinkerton* charge), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Roselli*, 432 F.2d 879, 894 n.25 (9th Cir. 1970) (omission of "reasonable foreseeability" instruction not reversible error), cert. denied, 401 U.S. 924 (1971); see also *Turcks*, 41 F.3d at 897-899 (upholding conviction on plain-error review under Fed. R. Crim. P. 52(b) because defendant was not prejudiced by erroneous *Pinkerton* charge). For that reason, this would be an inappropriate case for resolving any disagreement among the circuits concerning whether a *Pinkerton* instruction is incomplete if it omits "reasonable foreseeability" language.

2. Petitioners also contend (Pet. 10-14) that their convictions should be reversed because the district court failed to submit the materiality element to the jury with respect to the tax-fraud counts under 26 U.S.C. 7206.[2] That claim warrants no further review.

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[2] An individual violates Section 7206(1) if he "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." Similarly, an individual violates Section 7206(2) if he "[w]illfully aids or assists in * * * the preparation or

The materiality inquiry under Section 7206 asks "whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.'" *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969) (citation omitted); see also *United States* v. *Warden*, 545 F.2d 32, 37 (7th Cir. 1976). The materiality of false statements concerning a taxpayer's income or deductions therefore does not turn on the amount of unpaid tax. See *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996); *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989); *United States* v. *Young*, 804 F.2d 116, 119 (8th Cir. 1986), cert. denied, 482 U.S. 913 (1987); *United States* v. *Citron*, 783 F.2d 307, 313 (2d Cir. 1986); *United States* v. *Gaines*, 690 F.2d 849, 858 & n.16 (11th Cir. 1982); *United States* v. *Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); see also *United States* v. *Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992). To the contrary, any false statement on a tax return that underreports income or overstates deductions is necessarily material as a matter of law. See *Klausner*, 80 F.3d at 61.

Even if we assume that the district court's failure to submit the materiality issue to the jury was error under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), an issue that the court of appeals did not address, Pet. App. 26a, the court of appeals correctly found it to be harmless. This Court has held that many errors in jury instructions involving a single element of an offense are simple trial errors, subject to harmless-

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presentation under, or in connection with any matter arising under, the internal revenue laws, of a return * * * which is fraudulent or is false as to any material matter."

error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. 570, 580 (1986) (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense). For example, an instructional omission is harmless if, on a different count or element, the jury actually reached a determination that is "functionally equivalent" to the determination that was erroneously withheld from the jury. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993); *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment); see also *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam).

Here, as the court of appeals determined (Pet. App. 28a-30a), the district court's failure to submit the materiality issue to the jury was harmless because the jury in fact made the functional equivalent of a materiality finding. The district court instructed the jury that, to convict, it needed to find "beyond a reasonable doubt that the income was understated or that the deductions were overstated by some substantial amount." C.A. App. 1588; see Pet. App. 26a. In convicting petitioners, the jury made that finding, and, *a fortiori*, it necessarily found that petitioners' false statements met the less demanding test for materiality: "whether a particular item must be reported in order that the taxpayer estimate and compute his tax correctly." See Pet. App. 28a (internal quotation marks omitted); see also *Helmsley*, 941 F.2d at 92 ("False statements about income do not have to involve substantial amounts in order to violate [26 U.S.C. 7206(1)].").

Petitioners cite no case, and we are aware of none, in which a court of appeals has reversed a conviction for *Gaudin* error even where, as here, the jury actually made the functional equivalent of a materiality finding. Compare *United States* v. *DiRico*, 78 F.3d 732, 736-738 (1st Cir. 1996) (declining to conduct harmless-error review of *Gaudin* error, but not addressing whether such error might be harmless in cases where "functional equivalence" analysis would be available), with *United States* v. *Lopez*, 71 F.3d 954, 960-961 (1st Cir. 1995) (suggesting that *Gaudin* error is subject to harmless-error review under "functional equivalence" analysis, but declining to decide issue because facts of case foreclosed that analysis), cert. denied, 116 S. Ct. 2529, cert. dismissed, 117 S. Ct. 38 (1996); see also *United States* v. *DeCastro*, No. 95-4648, 1997 WL 20471, at *5-*6 (11th Cir. Feb. 5, 1997) (*Gaudin* error "is not reversible per se, but is subject to harmless error review"); *United States* v. *Keys*, 95 F.3d 874, 881 (9th Cir. 1996) (en banc) (reversing conviction for *Gaudin* error because, in deciding other elements of offense, "the jury would not necessarily have had to find that the false testimony in question was material"), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (reversing conviction for *Gaudin* error because "[t]he jury did not make any findings that are so closely related to the materiality issue that they are functionally equivalent to a materiality finding"); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (declining to conduct harmless-error review of *Gaudin* error, but not addressing applicability of "functional equivalence"

analysis).[3] In short, the court of appeals' decision was both correct and consistent with existing case law.[4]

3. Petitioners also argue (Pet. 14-15) that the district court erred in denying their motion to suppress

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[3] Relying on *Roy* v. *Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996) (en banc), later vacated by this Court in *California* v. *Roy*, 117 S. Ct. 337 (1996) (per curiam), the *Keys* court suggested that a "functional equivalence" analysis would be appropriate only where a trial court "simply fails to alert the jurors they must consider" an element of an offense, and not (as in this case) where "a court instructs the jury that an element of the crime has been established as a matter of law." 95 F.3d at 880; see also *United States* v. *Rogers*, 94 F.3d 1519, 1526 n.13 (11th Cir. 1996) (suggesting same and discussing pre-*Sullivan* Eleventh Circuit case law barring harmless-error review of erroneous directed verdicts). Those suggestions in the Ninth and Eleventh Circuits' opinions were dicta, and, to our knowledge, no court of appeals has directly held that harmless-error analysis is necessarily inappropriate in cases in which a district court instructs the jury that materiality is established as a matter of law.

[4] This Court recently granted certiorari to resolve a circuit conflict on the proper standard for appellate review of a district court's erroneous failure, in the absence of a timely objection, to submit to the jury the element of materiality in a perjury prosecution. See *Johnson* v. *United States*, cert. granted, 117 S. Ct. 451 (No. 96-203) (to be argued Feb. 25, 1997). This petition need not be held pending this Court's decision in *Johnson*. The petitioner in *Johnson*, like petitioners here, does argue that instructing the jury that the materiality element is satisfied constitutes "structural error" that can never be harmless. Unlike this case, however, *Johnson* is a plain-error case in which there is no claim that the jury actually made a functionally equivalent finding on the omitted element. This Court's resolution of *Johnson* is therefore unlikely to shed light on the issue presented here. (We have provided petitioners here with a copy of our brief in *Johnson*.)

attorney-client communications without conducting an evidentiary hearing. That claim is factbound and without merit.

An evidentiary hearing need be held on a defendant's pretrial motions only when the defendant demonstrates a colorable claim for relief. See generally *United States* v. *Voigt*, 89 F.3d 1050, 1067 (3d Cir.), cert. denied, 117 S. Ct. 623 (1996); *United States* v. *Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). Whether the defendant has made that threshold showing is left to the broad discretion of the district court. *United States* v. *Smith-Bowman*, 76 F.3d 634, 637 (5th Cir.), cert. denied, 116 S. Ct. 2537 (1996); *United States* v. *Richardson*, 764 F.2d 1514, 1527 (11th Cir.), cert. denied, 474 U.S. 952 (1985); *Harrelson*, 705 F.2d at 737; *United States* v. *Losing*, 539 F.2d 1174, 1178 (8th Cir. 1976).

Here, it was well within the district court's discretion to deny an evidentiary hearing on the issue of attorney-client privilege. The affidavits filed by all the lawyers in question refuted Aramony's claim that he was their client or that his communications to them were privileged. Moreover, the numerous documents submitted by the government—retention letters, UWA internal documents, checks for services rendered, and letters from Aramony's personal attorneys to UWA's counsel—all established that the lawyers in question represented only UWA and not Aramony. Finally, when UWA's counsel informed Aramony's personal attorney that he planned to produce documents about Aramony to the federal grand jury, neither Aramony nor his personal lawyer sought to prevent that disclosure on grounds of privilege. In those circumstances, and in light of Aramony's own failure to present credible evidence of

his own to support his privilege claims, the district court correctly denied Aramony's request for a pretrial evidentiary hearing. See Pet. App. 35a-45a. And, as the court of appeals held, because Merlo presented no evidence at all in support of his claim of privilege, no hearing to reject that claim was required. *Id.* at 45a n.14.

Petitioners assert (Pet. 14-15) that the court of appeals' disposition of the privilege issue conflicts with another Fourth Circuit decision and with the decisions of other circuits. That is incorrect. In the decisions at issue, the defendants had made more colorable claims of privilege than petitioners made here, and they therefore had a more plausible factual basis for seeking appellate relief based on the denial of an evidentiary hearing.

4. Finally, petitioner Merlo contends (Pet. 16) that the district court erred in refusing to give a "theory of defense" instruction. That claim is without substance. During the charge conference, Merlo's counsel told the court: "we just reserve the right to submit in the morning a theory of defense on behalf of Mr. Merlo, an instruction." Pet. App. 69a. The district court responded that it would not instruct the jury on the theories developed by either the prosecution or the defense, but that defense counsel was itself free to present Merlo's theory of the case in closing argument. *Ibid.* Defense counsel did not object to that ruling or actually submit a proposed "theory of defense" instruction. Indeed, petitioner still does not describe the instruction to which he claims he was entitled. Accordingly, there is no identifiable issue for this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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